

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

US EPA RECORDS CENTER REGION 5



514406

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its
Attorney General Hubert H.
Humphrey, III, its Department
of Health, and its Pollution
Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORA-
TION; HOUSING AND REDEVELOPMENT
AUTHORITY OF ST. LOUIS PARK;
OAK PARK VILLAGE ASSOCIATES;
RUSTIC OAKS CONDOMINIUM, INC.;
and PHILIP'S INVESTMENT CO.,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

MEMORANDUM OF REILLY TAR
AND CHEMICAL CORPORATION
IN OPPOSITION TO THE
MOTION OF THE UNITED STATES
AND THE STATE OF MINNESOTA
FOR SUMMARY JUDGEMENT ON
REILLY'S THIRD AFFIRMATIVE
DEFENSE TO THE UNITED
STATES' COMPLAINT AND FOURTH
AFFIRMATIVE DEFENSE TO THE
STATE'S COMPLAINT (NPDES)

INTRODUCTION

This memorandum is submitted in opposition to the United States' and the State of Minnesota's (the "State's") joint motion for summary judgment with respect to Reilly Tar and Chemical Corporation's ("Reilly's") Third Affirmative Defense to the United States' Complaint and Fourth Affirmative Defense to the States' Complaint. These defenses assert in substance that the liability of the City of St. Louis Park (the "City") and the nonliability of Reilly to remedy the alleged groundwater contamination problems at the site of the former Reilly plant in St. Louis Park has been fully adjudicated by the Minnesota Pollution Control Agency on behalf of the United States Environmental Protection Agency in an adjudicative administrative proceeding entitled "In the Matter of the Application of the City of St. Louis Park for a National Pollutant Discharge Elimination System Permit, file no. MN 0045489." Reilly asserts that this prior adjudication collaterally estops the United States and the State from alleging that Reilly is liable for the claims of soil and water contamination in St. Louis Park.

As outlined below, St. Louis Park had previously acquired the site from Reilly in 1972-73, expressly assuming responsibility for any and all questions of soil and water impurities and agreeing to hold Reilly harmless therefrom. Reilly contends that the NPDES proceedings were an adjudicative

affirmation and recognition of the responsibility of St. Louis Park -- and, concomitantly, the non-responsibility of Reilly -- for any and all questions of soil and water contamination related to the former Reilly site.

St. Louis Park has challenged Reilly's view of the scope and effect of its purchase of the property and its hold-harmless agreement, and that issue, with its many factual questions, remains for determination at trial. In Reilly's view, it is premature to consider in any form its NPDES estoppel defense before considering the matters challenged by St. Louis Park, and it is especially inappropriate to do so in a summary judgment context, where the court necessarily will not have before it all of the evidence relevant to the purchase agreement and hold-harmless matters. It is of crucial importance to view these matters in the full context of the situation at the time, and Reilly submits that it is not possible to do so here. Although this defense is separate from the settlement defense on which, as to the State, the Court has at least preliminarily ruled^{1/} it is similar in that it

^{1/} Since the Court's ruling, which Reilly has all along contended was premature, Reilly has uncovered additional and important evidence bearing on its settlement defense, much of which has been found in documents and tape recordings produced to Reilly by the State only after the State had been successful in its attempt to convince this Court that it should prevail in summary judgment on the issue. Because of this, Reilly fully intends to move the Court to reconsider its earlier ruling in due course.

cannot fairly be considered taken out of the context of all the evidence concerning the period which would be presented at trial, inasmuch as Reilly is then deprived of having the trier of fact review the totality of the evidence and draw its conclusions based on the cumulative effect thereof. Piecemeal, summary adjudication of issues such as this, where interrelated facts and inferences therefrom are deprived of their context and viewed in an unrealistic, isolated light, is not, Reilly submits, conducive to a fair resolution of such issues.

For purposes of the instant motion, if decided now, Reilly's assertions as to the scope and effect of the purchase agreement and hold harmless provision must be taken as true, with all reasonable inferences which may be drawn therefrom. Weber v. Towner City, 565 F.2d 1001, 1005 (8th Cir. 1977).

These assertions have been previously outlined for the Court in the Memorandum of Reilly In Opposition to the State of Minnesota's Motion for Summary Judgment On First Affirmative Defense (pp. 4-24), and Affidavits in support thereof. Those background facts will be only briefly recited here to remind the Court of the context involved.

BACKGROUND FACTS

The Court will recall that the alleged contamination that is the subject of the instant suit was also the subject of a suit filed by the State and the City against Reilly in State

Court on October 2, 1970. State of Minnesota, et al. v. Reilly Tar and Chemical Corp., Minn. Fourth Jud. District, File No. 670767. Prior to the institution of the 1970 lawsuit, the City had made a number of attempts to acquire the Reilly property. On April 14, 1972, the City and Reilly finally agreed upon a purchase of the real estate. On that date, a purchase agreement was entered into which provided for the purchase of the property by the City and provided in part:

4. Condition of Premises. It is understood as a part of the consideration of this purchase that the Buyer is acquiring said premises in an 'as is' condition, and that this 'as is' condition includes any and all questions of soil and water impurities and soil conditions; and that the City agrees to make no claim against the seller for damages relative to soil and water impurities, if any, in any way relating to the premises sold herein, or relative to any other premises in which the City of St. Louis Park holds an interest.

* * *

9. Current Litigation. It is understood that this agreement represents a means of settling the issues involved in State of Minnesota, by the Minnesota Pollution Control Agency and the City of St. Louis Park, Plaintiffs, vs. Reilly Tar & Chemical Corporation, Defendant, Hennepin County Minnesota District Court Civil File No. 670767. It is understood that the City of St. Louis Park will deliver dismissals with prejudice and without cost to defendant executed by itself and by the plaintiff State of Minnesota at closing. Defendant Reilly Tar & Chemical Corporation will deliver a dismissal of its counterclaim with prejudice and without cost to plaintiffs.

RTC Ex. 31 (attached as Appendix-1 to Affidavit of Edward J. Schwartzbauer filed in support of this Memorandum) (such attachments to said Affidavit are hereinafter referred to as A-__). Following the execution of the Purchase Agreement, the

PCA and the City created a joint commission to determine "a method whereby the City would clean up the area." RTC Ex. 32 (A-2).

Both the City and Reilly expected that, upon closing, the State would sign and deliver a dismissal as previously agreed. However, on June 15, 1973, Jack Van de North, an attorney for the MPCA wrote to Rolfe Worden, counsel for the City, advising that the State would not to dismiss the action until it recieved and reviewed a proposal from St. Louis Park for eliminating the potential pollution hazards at the site and suggesting that the staffs of the City and the State meet to discuss possible solutions. RTC Ex. 34 (A-3).

Accordingly, on June 19, 1973, Reilly and the City entered into an agreement which recited the State's refusal to sign the formal dismissal, and provided that:

The City hereby agrees to hold Reilly harmless from any and all claims which may be asserted against it by the State of Minnesota, acting by and through the Pollution Control Agency, and will be fully responsible for restoring the property, at its expense, to any condition that may be required by the Minnesota Pollution Control Agency.

RTC Ex. 71 (A-4). This agreement was drafted by Worden, one of the attorneys for the City, after discussions in which Reilly's attorney, Thomas Reiersgord, insisted upon an agreement which would, in effect, substitute the City in Reilly's place in the lawsuit. See, Worden deposition at 46-47, (A-5). Following the City's execution of its hold harmless agreement to Reilly, the State for years looked only to the City as the responsible party.

In November of 1974, at a meeting of the PCA Board attended by Wayne Popham for the City, the Board received a report from James Coleman of the Minnesota Department of Health ("MDH") who reported a potentially serious groundwater contamination problem (RTC Ex. 94, pg. 12) (A-6) and verified the presence in the soil of benzo[a]pyrene and ortho phenylene pyrene. RTC Ex. 95 (A-7). At that meeting, the Board unanimously adopted a resolution to the effect that "St. Louis Park would be responsible, at its own expense, for treatment of the run-off water in the storm sewer to reduce phenols and other pollutants...." RTC Ex. 94, pg. 13 (A-6). At that time, St. Louis Park and PCA lawyers were quoted as saying "it would be futile to go after the Republic Creosote Co., which provided the problem initially because despite knowledge of a potential threat, the City absolved the company from all future liability when it bought the land in 1973." RTC Ex. 96 (A-8).

The PCA and the City continued to meet to work out between themselves a plan to correct the soil and groundwater problem. They met on December 6, and agreed that the City, the PCA and the MDH would develop a plan of study to determine the magnitude of the soil and groundwater contamination and determine solutions. RTC Ex. 97 (A-9). The City and the State continued to act as though the City were responsible for the soil and groundwater contamination. No one suggested that Reilly fund the study, or arrange for remedial work, or meet

with the City or Agency representatives to draft a stipulation. Even as late as 1977, Sandra Gardebring, Executive Director of the Agency, clearly indicated her understanding as to who was the "responsible party" for cleaning up the contamination:

We need a responsible party and I think St. Louis Park has to be addressed by us as the responsible party.

11/18/77 article from St. Louis Park Newspaper. RTC Ex. 187 (A-10).

Following the purchase of the property, the City had begun planning for the construction of a storm sewer treatment facility for the Reilly property. The City and the State considered entering into a stipulation agreement with respect to the discharge of the storm and run-off water. In an undated communication sent early in 1974, the PCA apparently transmitted to the City a proposed stipulation, drafted by the PCA which recites in part: "The City has assumed responsibility for the former site of Reilly Tar & Chemical Company and Republic Creosote Company and some adjacent property...." RTC Ex. 92, ¶ 2 (A-11). The stipulation recites (¶ 6) that the Agency is alleging that the City is presently violating applicable Minnesota laws relating to water pollution, by allowing coal tar distillates to discharge into surface and underground waters of the State." The draft stipulation also provides that the City shall, by May 15, 1974,

retain a consulting engineer to prepare a comprehensive report on the contamination of groundwater and that the City shall construct and place into operation a disposal system for the collection and treatment of areal run-off to Minnehaha Creek, meeting effluent standards set forth in the stipulation.

THE NPDES PROCEEDINGS

In a January 20, 1975 memo to the PCA Board, William Donohue, counsel for the PCA, set forth the policy and law considerations relating to the PCA's authorization of the storm sewer treatment system. The memo specifically dealt with the issue of whether the PCA should authorize the treatment system by issuing a NPDES permit or by stipulation agreement. In that memorandum, Mr. Donohue states:

The St. Louis Park discharge water flows over soil that is contaminated to a great extent and the discharge itself is controlled by virtue of the treatment that is provided for the phenols and carcinogenics. On this basis, the staff has determined that an NPDES must be obtained in this situation.

Memorandum to Agency Board from W. P. Donohue dated 1/20/75, (A-12). On January 21, 1975, a resolution was adopted at a meeting of the MPCA Board calling for an expedited scheduling of a public hearing on the City's proposed discharge and NPDES hearing and authorized the Executive Director of the MPCA to appoint a hearing officer. Affidavit of Board's Authorizing Resolution dated 1/29/75 (A-13).

The National Pollutant Discharge Elimination System permit is a joint permit of the State and the Environmental Protection Agency. Johannes 9/8/83 deposition at 16 (A-14). The Federal Water Pollution Control Act in § 402, 33 U.S.C. § 1342, establishes the NPDES permit program. As indicated in the brief of the State and the United States, the Administrator of the Environmental Protection Agency ("EPA") is authorized to delegate the authority to issue permits to the states, with the EPA retaining authority for review and approval of permits. The MPCA has had authority to administer the NPDES permit program since June 30, 1974. See, e.g., Interim Modification Order for NPDES Permit No. MN 0003085 dated 4/1/75 (A-15). Proposed NPDES permits are submitted to the EPA for review and approval and are subject to EPA veto. 33 U.S.C. § 1342(d)(2).

In line with its authority to administer the NPDES permit program, the PCA conducted a hearing on the St. Louis Park application for a NPDES permit for a treatment system on the former Reilly property on February 27, 1975. The public hearing was to be conducted in accordance with Agency Rules of Procedure MPCA 1-13. Notice of Decision to Hold a Hearing dated 1/28/75 (A-16); RTC Ex. 229, Sec. IV.B. (A-17). MPCA 9, which was in effect at the time of the hearing, provided the procedural requirements for a hearing ordered by the Agency. The rule provides that parties have a right to legal counsel, discovery by the Agency is allowed, the Agency or hearing

officer has subpoena power, and notice of hearing is required. Parties also have the right to present witnesses, the right of cross-examination, and the right to appeal. 6 MCAR § 4.3009 (g), (k), (l), (m), (p) (1974).

The hearing officer for the proceeding was C. A. Johannes, Chief Water Pollution Control Engineer of the PCA, and former Director of the PCA Division of Water Quality in the early 1970's. Mr. Johannes was considered to be independent of the Agency for purposes of the hearing and was to remain impartial and render an objective decision. Appointment of Hearing Officer dated 1/28/75 (A-18).

The private parties to the hearing were Clean Air-Clean Water Unlimited, the Izaak Walton League and Minnesotans Against Pollution. The United States and the State in their brief in support of their motion for summary judgment make much of the fact that Reilly did not participate in the hearing. Reilly was not sent notice of the hearing, however, nor was Reilly invited to attend. St. Louis Park was also a party to the hearing. Wayne Popham, counsel for St. Louis Park, represented the City in the NPDES adjudication. Similarly, William Donohue, Special Assistant Attorney General, appeared representing the MPCA.

Following the hearing, hearing examiner Johannes made Findings of Facts, Conclusions, and Recommendations. RTC Ex. 232 (A-19). The findings, conclusions, and recommendations

of the hearing examiner were approved by the PCA Board on March 18, 1975. Transcript of Minnesota Pollution Control Agency Board Meeting at pp. 37:18-38:22, attached to the Affidavit of Eldon G. Kaul submitted in support of the Brief of the United States and the State of Minnesota (hereinafter "Board Meeting Transcript"). The PCA Board, on the same date also approved the NPDES permit for the St. Louis Park Treatment facility. Board Meeting Transcript 37:18-38:22. The permit proposal which was redrafted in accordance with the findings of fact resulting from the public hearing was sent to the EPA for approval on March 19, 1975. RTC Ex. 236 (A-20). Following EPA approval, the final NPDES permit was received by St. Louis Park on April 15, 1975. Breimhurst letter to Cherches (A-21).

ARGUMENT

I. The Administrative Adjudication In The NPDES Hearing On The Settlement Of The Lawsuit Established The Liability Of The City And The Nonliability Of Reilly For Soil And Groundwater Contamination And Collaterally Estops The Plaintiffs From Raising That Issue In The Present Litigation

The liability of the City of St. Louis Park to remedy the contamination problems in St. Louis Park was established by an adjudicative affirmation through the NPDES proceedings of the settlement of the lawsuit between the City and Reilly and the City's purchase of the property in an "as is" condition.

One of the specific issues which was addressed at the NPDES hearing was the issue of whether the description of the

facility in the permit should reflect the past activities that occurred at the site. RTC Ex. 230, ¶ 9 (A-22). This issue was adjudicated at the administrative hearing. The addition of the history of the litigation relating to the settlement of the lawsuit was specifically requested by the City of St. Louis Park to be included in the final permit. Wayne Popham, counsel for the City, testified about the history of the litigation, the settlement, and how St. Louis Park became involved in seeking a NPDES permit.

Mr. Popham testified at the NPDES hearing that St. Louis Park brought an action against Reilly to eliminate air and water pollution at the former Reilly site. Transcript In the Matter of a Public Hearing on the Application of the City of St. Louis Park for a NPDES Permit to Discharge from A Wastewater Treatment System on the former Republic Creosote Site to Minnehaha Creek dated 2/27/75, pgs. 8:19-9:6 (A-23) (hereinafter "Hearing Transcript"). He further testified that the City purchased the property from Reilly on an "as is" basis and dismissed the litigation as a provision of the settlement agreement. Hearing Transcript, pp. 12:10-12:16 (A-23). Because of the settlement of the lawsuit, the purchase of the Reilly site "as is" and the subsequent hold harmless agreement, the City assumed liability for correcting the contamination problems in St. Louis Park.

Before the hearing concluded, Mr. Popham requested that the historical background of the City's involvement be specifically included in the final permit itself. He emphasized that the inclusion of the language concerning the background of the City's involvement was not expected to put the City in any favored position but would rather explain why the City was now looking to correct pollution problems. Hearing Transcript, pp. 241:1-242:19 (A-23).

The historical background on the settlement of the lawsuit and the City's purchase of the property, which placed the City in a position of responsibility for remedying the contamination problems, was adjudicated in the NPDES proceeding. Based upon the evidence presented at the hearing, the hearing examiner made the following finding of fact on the past history of the site:

In October, 1970, the Agency and the city commenced an action against Reilly Tar and Chemical Company to abate pollution of waters of the State resulting from its creosoting operations. Earlier investigations made by the Agency and the city provided evidence of pollution of surface and groundwaters by coal tar distillates and other industrial chemicals at and in the vicinity of the Republic Creosote Plant. As a settlement of that litigation with the company, the city purchased from the company the site on which the plant was located, it being the intent of the city to redevelop the site for housing.

RTC Ex. 232 (A-19) (emphasis added). The hearing officer also recommended that the permit be modified to include a historical description of the site. RTC Ex. 232, p. 13 and Attachment B

(A-19). The finding of fact of the hearing examiner on the past history of the site and the recommendation to include a description of this history in the permit was adopted by the PCA Board without alteration. Board Meeting Transcript, pp. 37:18-38:22. The language concerning the settlement of the lawsuit against Reilly by the City was included in the final NPDES permit which was approved by the EPA and issued to St. Louis Park. Authorization to Discharge Under the NPDES and State Disposal System Permit Program, Permit No. MN 0045489 (A-21).

Because of this administrative adjudication of a settlement between Reilly and St. Louis Park, and the resulting liability of the City, the United States and the State in this present action should be estopped from raising the liability of Reilly for the St. Louis Park contamination problems. It is accepted that collateral estoppel is applicable to decisions of administrative agencies acting in a judicial capacity. United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966); United States v. Karlen, 645 F.2d 635 (8th Cir. 1981); Gear v. City of Des Moines, 514 F. Supp. 1218 (S.D. Iowa 1981). This premise is not disputed by the United States or the State in their brief in support of their motion for summary judgment.

In order for an administrative adjudication to have preclusive effect in a later action, the following prerequisites must be met:

- (1) The issue must be identical to the one in the prior adjudication;
- (2) There was final judgment on the merits;
- (3) The estopped party was a party or is in privity with a party to the prior adjudication; and
- (4) The estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Anthran v. Professional Air Traffic Controllers, 672 F.2d 706, 709 (8th Cir. 1982). The NPDES administrative adjudication meets all of the required prerequisites. The liability of St. Louis Park and therefore the nonliability of Reilly was adjudged by the finding that the lawsuit was settled. This finding on the settlement of the lawsuit was a final judgment which was adjudicated by an impartial hearing examiner, adopted by the MPCA Board and included in the final permit which was issued to St. Louis Park by the MPCA and the EPA.

Factually, it is clear that the State of Minnesota was a party to the NPDES permit. The State was represented by counsel at the hearing. (Hearing Transcript at 4:16-4:18) (A-23). The State participated in the hearing by presenting testimony and documentary evidence and had the right to cross-examine witnesses which it exercised.

It is also clear that the United States was in privity with the State. As indicated in the brief of the United States and the State of Minnesota, privity exists when the parties

have a close relationship bordering on near identity.

Midcontinent Broad-Casting v. Dresser Industries, Inc., 609 F.2d 564, 567 (8th Cir. 1982). Substantial identity exists between the Pollution Control Agency and the Environmental Protection Agency. The NPDES hearing was conducted under authority delegated by the EPA to the PCA. The NPDES permit which was issued to St. Louis Park was jointly issued by the State and the EPA, under the authority of the Federal Water Pollution Control Act. Furthermore, it has been held that the relationship between a state environmental agency and the EPA in issuing a NPDES permit may be labeled sufficiently close to preclude the EPA from relitigating an issue which was resolved in a state court action between the state agency and the permit holder. United States v. ITT Rayonier, Inc., 627 F.2d 996, 1003 (9th Cir. 1980).

The State was further given a full and fair opportunity to be heard on the adjudicated issues. The State was allowed the opportunity to present evidence, and to offer argument, and had the right to cross-examine witnesses, including Mr. Popham, who presented evidence on the settlement of the lawsuit. Moreover, the State acted as both party and adjudicator here, participating in the hearing and, in the form of the MPCA Board, reviewing and adopting the findings of the hearing officer. The fact that the State did not contest the evidence on the settlement of the lawsuit by the City which

established St. Louis Park's liability is of no consequence. It is clear that "an express finding in a valid final judgment is good enough [for purposes of collateral estoppel].... And it makes no difference whether such a finding was based on a complete failure of proof rather than on a weighing of competing failure of proof." Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 469 (7th Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 2430 (1983); Wilson v. Pfeiffer, 565 F. Supp. 115, 117 (S.D.N.Y. 1983). Therefore, it is clear that the administrative adjudication on the issue of the settlement of the lawsuit establishing the liability of the City and the non-liability of Reilly for the contamination problems in St. Louis Park is binding on the State and the United States and they should be precluding under collateral estoppel principals from raising that issue in this litigation.

II. The Hearing On The City's NPDES Permit And The NPDES Permit Addressed Soil And Groundwater Pollution

The United States and the State of Minnesota argue in their brief in support of their motion for summary judgment that the City's NPDES permit by its terms does not concern groundwater or soil pollution. This assertion misstates the facts. The Notice of Public Hearing specifically provides that an issue in the hearing was whether the permit should provide for consideration of conditions with respect to the groundwater and soil of the area drained by the proposed storm water treatment system. RTC Ex. 229, p. 2 (A-17).

There was a substantial amount of evidence at the hearing on the groundwater issue and how it was related to the surface water permit. Wayne Long, of Orr, Schelen, Mayeron, consultants for the City on the storm water treatment system, acknowledged that the groundwater and surface water problems were intertwined. He testified in the NPDES hearing that the treatment system would prevent the percolation of contaminants into the soil and groundwater and that the system would lower the groundwater level and pull groundwater out of the contaminated areas. Hearing Transcript, pp. 24:5-22:16 (A-23). He testified that one of the primary needs of the storm sewer system was to prevent the percolation of contaminants down further in the ground. Hearing Transcript, pp. 72:5-72:19 (A-23).

Similarly, Dave Rudberg, the Director of Public Works for the City of St. Louis Park, testified that without the storm sewer system, the surface drainage would continue to move down through any contamination which might exist in the soil and would create additional problems with the groundwaters. Hearing Transcript, pp. 115:5-115:8 (A-23). Lawrence Kelley of the Minnehaha Creek also testified that the groundwater and surface waters are very much linked together in the storm sewer project. Hearing Transcript, pp. 174:15-174-20 (A-23).

It appears from this testimony that the storm sewer treatment system for which the NPDES permit was sought was

viewed as a means of controlling additional pollution of the groundwater as well as controlling the discharges from the storm water into the receiving waters of Minnehaha Creek.

In line with this testimony, the hearing examiner concluded that the storm sewer treatment project may be expected to enhance prospects for an early start on rehabilitation of the waters and soils underlying the site while at the same time minimizing any significant extension of the zone of the polluted groundwater. RTC Ex. 232, pp. 7-8 (A-19). The hearing examiner also made a finding that because of the interrelated nature of the surface and groundwater problems, it was reasonable to incorporate into the permit general conditions with respect to the resolution of the groundwater problem. RTC Ex. 232 (A-19). The conclusion and finding of fact were unanimously adopted by the PCA Board. Board Meeting Transcript, pp. 37:18-38:22. The final permit did include a provision for monitoring the subsurface soils in the area of the land farming operation^{2/} in the same parameters as required for the discharge into Minnehaha Creek.

^{2/} Land farming is a general technique of aerating contaminated soil to allow natural organisms in the soil to degrade phenol pollutants. This is accomplished by mixing the contaminated soil with farm fertilizers and planting farm crops on the soil. The natural micro-organisms in the soil, through their natural activity biodegrade the greases and oils down to phenols and further down to unarmful acids. This land farming technique was part of the St. Louis Park storm sewer treatment system. See, Testimony of W. Long, Hearing Transcript, pp. 23-25 (A-23).

Authorization to Discharge Under the MPDES and State Disposal System Permit Program, Permit No. MN 0045489, p. 8 (A-21).

The finding of fact on the interrelated nature of the surface and groundwater problems and the monitoring requirements for subsurface soils which would measure the migration of contaminants into the subsurface soil and groundwater was discussed at the PCA Board meeting of March 18, 1975. Mr. Johannes, the NPDES hearing examiner, explained to the Board that a general condition with respect to the groundwater problem was incorporated into the permit to monitor the effects of the land farming operation on the subsurface soils and groundwater. Board Meeting Transcript, pp. 11:10-11:22. Therefore, the permit does address groundwater and soil pollution, contrary to the assertion of the United States and the State that it does not.

In their brief in support of their motion for summary judgment, the United States and the State of Minnesota state that the PCA Board did not accept hearing examiner Johannes' recommendations that the City be required to submit a plan to abate groundwater pollution. See, RTC Ex. 232, p. 12, Recommendation 4 (A-19). This is a misstatement of the facts. Although the Board did consider deleting this recommendation, they chose to amend this finding rather than to delete it entirely. The Board amended the recommendation to read as follows:

Require the Applicant to submit to the Agency for approval a proposal for an adequate plan of study to determine the extent and severity of the pollution of the underground waters resulting from the discharge of wastes at the former Republic Creosote site, and to cooperate in providing measures for satisfactory control of such groundwater pollution at the earliest possible time.

Board Meeting Transcript, pp. 35:4-38:24. By making this amendment in the recommendations of the hearing examiner, the Board did not intend to waive its right of legal action against the City if the cleanup of the groundwater pollution was not instituted by the City. Board Meeting Transcript, pp. 36:7-36:19. In fact, Mr. Worden, counsel for the City stated at that Board meeting that the City was committed to the resolution of the groundwater problem, and on the subject of deleting the hearing examiner's finding on the requirement of a study by the City, Mr. Worden stated:

...at the same time the PCA is not waiving any kind of rights that they might have against the City should the City not cooperate, and the City, I know, is programmed to fully cooperate and resolve this situation....

Board Meeting Transcript, pp. 33:3-33:11. The amendment to the recommendation did not affect the recognition of the City's liability for the contamination problems; it was directed to the City's ability or inability to fund the contamination remedies. Board Meeting Transcript, pp. 34:9-35:17. Nowhere in the Board Meeting Transcript does the Board refer to Reilly as a responsible party for any part of the cleanup activity.

In fact, with respect to the funding of the groundwater corrective actions, the Board and PCA staff recognized that the City did not have the ability to fund a study and state and federal assistance would be required. Groundwater Study Republic Creosote Area, St. Louis Park, Minnesota dated March 12, 1975, p. 4 (A-24); Board Meeting Transcript, pp. 16:16-26:25.

The United States and the State similarly argue that the provision in the permit which deals with the absence of prejudice to the position of any party to the NPDES permit on the matter of the cost of remedying the soil and groundwater contamination somehow affects the adjudicative affirmation of the liability of St. Louis Park for the contamination of soil and groundwater. Brief of United States and State of Minnesota at pp. 7, 9.

The language in the permit which deals with remedial measures for the soils and groundwaters does not address the subject of liability for soil and groundwater contamination. Rather, the permit states on page 6 that:

This permit...is without prejudice to the position of any party on the matter of responsibility for the cost of whatever ultimate work needs to be done to rehabilitate or eliminate any pollution associated to the soils and its groundwaters.

Authorization to Discharge Under the NPDES and State Disposal System Permit Program, Permit No. MN 0045489, (A-21) (emphasis added). Viewed in the proper context, it is apparent that this

paragraph was included in the permit so that the City would not be precluded from obtaining state and federal assistance for any additional remedial work for soil and groundwater pollution. Board Meeting Transcript, pp. 34:16-35:3; Groundwater Study Republic Creosote Area, St. Louis Park, Minnesota dated March 12, 1975, p. 4 (A-24). Board Chairman Field commented that they had previously decided not to make the City shoulder the entire burden of the cost (Board Meeting Transcript, pp. 34:23-35:17) and this provision reflected that, and no more.

III. The State-Administered NPDES Permit Program
Includes Regulation of Groundwater

The government further argues that an NPDES permit could not have dealt with groundwater under the Clean Water Act. It contends that the Clean Water Act is limited to "navigable waters." This construction of the statute, however, is incorrect because it does not distinguish between the initial federal NPDES permit program and the subsequent state NPDES permit program. In fact, under the state NPDES permit program, which is involved in this case, the statute actually requires the states to address groundwater contamination as well as contamination of navigable waters.

In order to understand the misconstruction by the government, the general scheme of the statute must be kept in mind. The Federal Water Pollution Control Act Amendments of

1972, 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981), establish a "national pollutant discharge elimination system," or NPDES. Id. § 1342. According to this system, "the discharge of any pollutant by any person shall be unlawful." Id. § 1311(a). However, this blanket prohibition is subject to the NPDES permit programs, whereby a party may obtain authorization to discharge pollutants by applying for an NPDES permit pursuant to the programs established pursuant to § 1342. Id. § 1342. See, id. § 1311(a). See, Environmental Protection Agency v. State Water Resources Control Board, 426 U.S. 200, 205 (1976) ("Under the NPDES, it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms." (Footnote omitted.)).

What the government has failed to comprehend in its brief is that § 1342 actually authorizes two NPDES permit programs, the initial program to be administered by the federal Government (the EPA), and the subsequent program to be administered by the states. Section 1342(a) authorizes and requires the Administrator of the EPA to establish an NPDES permit program. But section 1342(b) provides that a state may establish its own NPDES permit program by applying for and obtaining EPA approval of that program. Once the state has obtained approval of its own NPDES permit program, § 1342(c) abolishes the initial EPA program established under subsection (a) of § 1342. Under the state-run program, the state must

submit to the EPA each permit that it intends to issue, and the EPA has a veto power over each permit. § 1342(d). The EPA also retains general review power over the enforcement of the state's program. In other words, the statute establishes an initial federal NPDES permit program which is to be in operation only until the state has established and obtained approval of its own NPDES permit program. Once the state has established its program, the EPA ceases to administer its own program, but retains review power over the state program.

This understanding of the statute is the uniform construction of the statute in the courts. See, Environmental Protection Agency v. State Water Resources Control Board, 426 U.S. at 206-208; Shell Oil Co. v. Train, 585 F.2d 408, 410 (9th Cir. 1978); Save the Bay Inc. v. Environmental Protection Agency, 556 F.2d 1282, 1285 (5th Cir. 1977); Chesapeake Bay Foundation, Inc. v. Virginia State Water Control Board, 495 F. Supp. 1229, 1231-1232 (E.D. Va. 1980).

The importance of distinguishing between the initial, start-up federally-administered NPDES permit program and the state-administered NPDES program is that the scope and extent of the state program is broader than that of the federal program. The federal program was limited to "navigable waters." However, the state program was not only permitted to deal with groundwater and other problems, in fact the statute actually required it to do so.

With respect to the initial, federally-administered program, § 1342(a) limits the authorization of the EPA to "navigable waters." As explained in Exxon Corp. v. Train, 554 F.2d 1310, 1318 (5th Cir. 1977), a case relied on by the government, § 1342(a) authorizes the EPA to issue a permit "for the discharge of any pollutant." But § 1362(12) defines discharge of a pollutant as "any addition of any pollutant to navigable waters...." The Exxon Corp. v. Train court correctly concludes, from this statutory language as well as the legislative history, that the EPA-administered NPDES permit program was restricted to navigable waters.

In contrast, the state-administered NPDES permit program was not limited to navigable waters. In fact, it was required to deal with groundwater. As previously explained, the EPA's approval was required before the state's NPDES permit program could become operational. Section 1342(b)(1)(D) prohibits the EPA from approving a state permit program which does not "control the disposal of pollutants into wells." As discussed in Exxon Corp. v. Train, "deep wells" "groundwaters," and "subsurface waters" are used synonymously. 554 F.2d at 1312 n. 1. That Congress intended this broader scope of the state program is clearly indicated by the legislative history, which is extensively discussed in Exxon Corp. v. Train. That court concluded that "the congressional plan was to leave control over subsurface pollution to the states....", 554 F.2d

at 1322, and that "it also evidences a clear intent to leave the establishment of standards and controls for groundwater pollution to the states...." Id. at 1325.

Unfortunately, the government's brief never makes this critical distinction. Each of the cases and legislative history cited by its brief for the proposition that groundwaters are not included in the NPDES permit program involve the initial EPA-administered program. In Exxon Corp. v. Train, which discusses and clarifies the differences between the two NPDES permit programs, the EPA nevertheless sought the authority to regulate groundwater pollution in certain circumstances. The court rejected that claim, concluding that Congress intended to restrict regulation of groundwater pollution to the state-administered NPDES permit program. While a state agency was also involved in that case, the state, Alabama, had not yet had an EPA-approved NPDES permit program, therefore the initial EPA NPDES permit program was still in effect. United States v. GAF Corporation, 389 F. Supp. 1379 (S.D. Texas 1975), also involved the EPA-administered program. United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977), which concluded that groundwater pollution was subject to the NPDES permit programs, never makes clear the distinction between the two NPDES programs, concluding simply that groundwater pollution "may properly be regulated by the permit-granting authorities pursuant to [§§ 1342(a)(3) and

(b)]." Id. at 852. The same applies to the legislative history cited by the government. For instance, on page 12 of its brief, the government quotes a portion of the Report of the Senate Committee on Public Works. The government concludes that this passage rejects any regulation of groundwater pollution under the NPDES permit system, but it fails to make the qualification that the Committee was rejecting "Federally approved standards for groundwaters" (emphasis added).

The government contends that the NPDES permit program does not authorize regulation of groundwater pollution. But its construction of the statute utterly fails to make the distinction between the initial EPA-administered NPDES permit program and the subsequent state-administered NPDES permit program, a distinction which was critical to Congress and to the present motion. Of course, the program in effect in this case was the Minnesota state-administered NPDES permit program, which had been approved by the EPA in 1974. See Minnesota v. Hoffman, 543 F.2d 1198, 1201 n. 9 (8th Cir. 1976). The government's argument that it is entitled to summary judgment because the NPDES permit program was not authorized to address groundwater pollution is simply without merit.

IV. The Alleged Groundwater and Soil Contamination is Associated with a "Point" Source

The government has offered an additional argument in support of its premise that the statute requires summary

judgment in its favor. It contends that the groundwater and soil contamination on the site could not have satisfied the statutory requirement that the discharge be from a "point source" as that term is defined in the statute. But the case law, which the government's brief largely ignores, indicates that "point source" is a broader concept than the government makes it out to be, and that whether a "point source" is present is a factual issue, precluding summary judgment.

Section 1311(a) provides that, in the absence of a permit, "the discharge of any pollutant by any person shall be unlawful." Section 1362(12) defines discharge of a pollutant as "any addition of any pollutant to navigable waters from any point source" (emphasis added). Section 1362(12) defines point source as "any discernible, confined and concrete conveyance." The government concedes that "(o)bviously, the City's storm sewer would qualify as the type of affirmative action necessary to create a point source. . . ." Government's Brief at 17. But despite the presence of a point source, the government nevertheless concludes that the NPDES permits in this case cannot have included the groundwater and soil contamination on the same site.

In United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979), the court broadly interpreted the concept of "point source." The defendant, Earth Sciences, operated a gold leaching operation whereby a toxic substance was sprayed over

gold ore to separate the gold from the ore. The process contaminated groundwater. On a motion for summary judgment, Earth Sciences argued that there was no "point source," and the district court agreed. The Tenth Circuit reversed. Reasoning that the statute "was designed to regulate to the fullest extent possible those sources emitting pollution into rivers, streams and lakes," id. at 373, the court gave the concept of point source "the broadest possible definition". Id. The court concluded from the legislative history that a "non-point source" referred to highway runoff, storm runoff, and other similar discharge where it is "virtually impossible to isolate to one polluter" the source of the runoff. Id. at 371, 373. The court essentially held that uncollected surface runoff can be discharge of a pollutant from a point source if the source of the discharge can be identified.

In Sierra Club v. Abston Construction Co., 620 F.2d 41 (5th Cir. 1980), the court held that pollution carried from a strip mine to a creek in various ways, including groundwater seepage, could constitute a point source. In fact, the court stated that the initial collection of materials combined with gravity could constitute a point source. Id. at 45.

The alleged groundwater and soil contamination at the former Reilly site in combination with surface runoff water, meets the statutory definition. This is not runoff from a highway where it is impossible to isolate or identify the

source of the pollutants; one identifiable site is involved. Given the broad purposes of the statute and its interpretation by the courts, it is difficult to believe that this site could not constitute a "point source."

Indeed, the government concedes that the City's storm sewer constituted a point source. The government simply now disagrees with the factual determination of the hearing officer that the groundwaters and soil contamination were included in the point source. The hearing officer expressly found that:

The proposed discharge of surface runoff water combined with soluble and suspended substances derived from the waste residues of the former Republic Creosote site constitutes a point source.

Hearing Examiner's Findings at 8 (A-19). Contrary to the government's brief, the hearing examiner clearly found that the "waste residues" already at the site, combined with the surface runoff water, satisfy the requirement of a point source.

At the very least, whether a point source exists is a factual issue, precluding summary judgment. In Sierra Club v. Abston Construction Co., supra, the court reversed the district court's grant of summary judgment on the ground that whether there was a point source was a material factual issue. In United States v. Oxford Royal Mushroom Products, Inc., 487 F. Supp. 852, 854 (E.D. Pa. 1980), the court held that the existence of a point source "is a factual question." In South Carolina Wildlife Federation v. Alexander, 457 F. Supp. 118

(D.S.C. 1978), the court denied a motion to dismiss on the ground that whether dams constituted a point source was a question of fact to be determined at trial.

These considerations clearly indicate that the waste residues at the site could be, and were regarded as a point source. This is a factual determination, and one which the hearing officer in fact made. The government should not be allowed to reopen this factual issue. In any event, whether a point source existed is still a factual issue, and, therefore, summary judgment is inappropriate.

V. Reilly Need Not be in Privity with the Permittee

The government also contends that Reilly cannot rely on the permit issued to the City of St. Louis Park because Reilly was not in privity with the City. The government reasons that collateral estoppel against the government requires mutuality of parties. But the government, in citing a very recent Supreme Court case, fails to mention the companion case, or a case from the previous term which, when considered together, indicate that mutuality is not required in the circumstances of this case.

In Nevada v. United States, ____ U.S. ____, 103 S. Ct. 2906 (1983), the federal government brought an action in 1973 to obtain additional water rights to the Truckee River, in west central Nevada, on behalf of an Indian reservation. However,

in 1908 the federal government had filed a prior action, referred to as the Orr Ditch litigation, to obtain a final decree of the water rights of the same Indian reservation to the Truckee River. A final decree was filed in 1944, from which no appeal was taken. The Supreme Court held that the federal government was barred from relitigating the issue, even as to defendants who were not parties to the Orr Ditch litigation. In fact, the Nevada Court reached this conclusion on res judicata grounds, despite its recognition that mutuality is generally required for application of that doctrine. The Court contrasted collateral estoppel, which, it noted bars "a broader class of litigants." id. at 2918 n. 11, stating that "mutality has been for the most part abandoned in cases involving collateral estoppel." Id. at 2925.

In 1984, the Supreme Court addressed the question of collateral estoppel against the federal government in two cases decided the same day. In United States v. Mendoza, ___ U.S. ___, 104 S. Ct. 568 (1984), on which the government relies, the Supreme Court held that, for policy reasons peculiar to the federal government, the doctrine of non-mutual offensive collateral estoppel does not apply to the United States. Moreover, in the companion case, United States v. Stauffer Chemical Co., ___ U.S. ___, 104 S. Ct. 575 (1984), the Court held that the doctrine of mutual defensive collateral estoppel

does apply to the federal government.^{3/} The Mendoza court, however, expressly recognized the continuing validity of Nevada v. United States, 104 S. Ct. at 574 n. 8, where non-mutual defensive estoppel by judgment had been used against the United States. Thus, although the Supreme Court has not directly ruled on the use of non-mutual defensive collateral estoppel against the federal government, the holdings in Nevada v. United States and United States v. Stauffer Chemical Co., indicate that non-mutual defensive estoppel may properly be applied.

It is also noteworthy that United States v. Mendoza involves only the federal government, not state governments. The policy considerations supporting the ruling on the facts of that case, which turn on the fact that the federal government is involved in litigation in various courts throughout the country, simply do not apply to state governments. State governments are not involved in extensive litigation throughout the country; when a state government appears in federal court, it is much more like a private party in that respect than it is like the federal government.

^{3/} "Offensive" collateral estoppel occurs when "a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party," while "defensive" collateral estoppel occurs when "a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party." United States v. Mendoza, 104 S. Ct. at 572 n. 4.

CONCLUSION

The United States and the State of Minnesota have not established that they are entitled to summary judgment as a matter of law. It also is evidence that the parties dispute the material fact as to whether the NPDES proceedings dealt with surface and groundwater contamination. Under these circumstances, summary judgment is not appropriate. Summary judgment is only appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962). These standards governing consideration of summary judgment motions have been clearly and repeatedly stated by the Eighth Circuit Court of Appeals. See, McClain v. Meier, 612 F.2d 349, 355 (8th Cir. 1979).

It has further been stated that summary judgment "is an extreme and treacherous remedy, not to be entered unless the movant has established its right to judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances." Vette Co. v. Aetna Casualty and Surety Co., 612 F.2d 1076, 1077 (8th Cir. 1980); see, Keys v. Lutheran Family and Children's Services of Missouri, 668 F.2d 356 (8th Cir. 1981). The State and the United States have not met this exceedingly high standard in this case. In fact, Reilly has

demonstrated that an administrative adjudication was made on the liability of St. Louis Park in a proceeding which addressed surface water, groundwater and soil contamination. Reilly has established that the State was a party to that adjudication and the United States was in privity with the State and, therefore, both parties should be bound by the liability determination which was made in that adjudication.

Accordingly, for the reasons stated above, the motion of Plaintiffs United States and the State of Minnesota for summary judgment on defendant Reilly Tar & Chemical Corporation's Third Affirmative Defense to the U.S. Complaint and Fourth Affirmative Defense to the State's Complaint should be denied.

Dated: March 16, 1984.

Respectfully submitted,

DORSEY & WHITNEY

By 

Edward J. Schwartzbauer

Becky A. Comstock

Michael J. Wahoske

James E. Dorsey III

Renee Pritzker

2200 First Bank Place East
Minneapolis, Minnesota 55402
Telephone: (612) 340-2600

Attorneys for Reilly Tar &
Chemical Corporation